79-949

Supreme Court, U. S.
FILED
DEC 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

THE STATE OF TEXAS,

Petitioner

V.

EDITH REYNOLDS
AND
RUBEN COLUNGA,

Respondents

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

THOMAS F. LEE
District Attorney
63rd Judicial District
Del Rio, Texas 78840

BILL M. WHITE
Criminal District Attorney
Bexar County
San Antonio, Texas 78204

INDEX

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASES 3

REASONS FOR GRANTING THE WRIT 6

ARGUMENT 7

I. The Texas Court of Criminal Appeals Incorrectly Held Fully Retroactive this Court's Holdings in *Burks v. United States* and *Greene v. Massey* 7

II. *Burks* and *Greene* Do Not Bar Retrial Following an Appellate Reversal for Evidentiary Error under a State Statute Requiring Corroboration of Accomplice Witness Testimony Because under the Constitutional Standard Set Forth in *Jackson v. Virginia*, a Rational Trier of Fact Could Have Found Respondents Guilty upon the Basis of that Uncorroborated Testimony 12

III. The Retroactivity and Scope of *Burks* and *Greene* Are Questions of National Importance 17

A. Unless these Cases Are Held to Be Prospective or Limited in Scope, the Number of Prisoners Who May Receive Drastic Relief -- Outright Release -- Is Substantial, Even Though All Are Now Imprisoned as a Result of an Otherwise Constitutionally Impregnable Conviction 17

B. This Case Presents a Significant Opportunity to Diminish The Unfair Impact of this Court's Decision in *Jackson v. Virginia* 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page**

Abney v. United States, 431 U.S. 651 (1977) 9

Ashe v. Swenson, 397 U.S. 436 (1970) 9

Benton v. Maryland, 395 U.S. 784 (1969) 12

Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975) 9

Breed v. Jones, 421 U.S. 519 (1975) 9

Burks v. United States, 437 U.S. 1 (1978) ..... passim

Caminetti v. United States, 242 U.S. 470 (1917) 15

Colunga v. State, 481 S.W.2d 866 (Tex.Crim.App. 1972) 5, 13, 14, 16

Colunga v. State, 527 S.W.2d 285 (Tex.Crim.App. 1975) 6, 16

Cox v. State, 13 Crim.Rep. 479 (Tex.Ct.App. 1883) 14

Crist v. Bretz, 437 U.S. 28 (1978) 9

Dalrymple v. State, 366 S.W.2d 576 (Tex.Crim.App. 1963) 14

Desist v. United States, 394 U.S. 244 (1969) 8

Dodson v. State, 6 S.W. 548 (Tex.Ct.App. 1887) 14

Ex parte Colunga, 587 S.W.2d 426 (Tex.Crim.App. 1979) 1, 2, 16

Ex parte Reynolds, No. 60,647 (Tex.Crim.App. June 20, 1979, *reh. denied*, Sept. 19, 1979 ..... 1, 2

Greene v. Massey, 437 U.S. 19 (1978) ..... passim

Green v. United States, 355 U.S. 184 (1957) 12

Hankerson v. North Carolina, 432 U.S. 19 (1977) 11

Harris v. State, 524 S.W.2d 65 (Tex.Crim.App. 1975) 14

Holt v. Black, 550 F.2d 1061 (6th Cir.), *cert. denied*, 432 U.S. 910 (1977) 9

Ivan V. v. City of New York, 407 U.S. 203 (1972) 11

Jackson v. Justices of Superior Court of Mass., 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977) 9

Jackson v. Virginia, 433 U.S. ___, 99 S.Ct. 2781 (1979) 6, 7, 12, 15, 18, 19

Johnson v. State, 33 Tex. 570 (Tex. 1870) 14

Johnson v. State, 88 S.W.2d 108 (Tex.Crim.App. 1935) 14

Johnson v. State, 571 S.W.2d 4 (Tex.Crim.App. 1978) 10, 12

Linkletter v. Walker, 381 U.S. 618 (1965) 8

Lopez v. State, 34 Tex. 133 (Tex. 1871) 14

Mizell v. Attorney General of New York, 586 F.2d 942 (2d Cir. 1978), *cert. denied*, ___U.S.___, 99 S.Ct. 1519 (1979) 9

Reynolds v. State, 489 S.W.2d 866 (Tex.Crim.App. 1972) 4, 13

Roberd v. State, 276 S.W.2d 270 (Tex.Crim.App. 1955) 14

Robinson v. Neil, 409 U.S. 505 (1973) 8, 9, 11

Stovall v. Denno, 388 U.S. 293 (1967) 8

Texas v. Mixon & Dixon, petition for cert. filed, 48 U.S.L.W. 3274 (U.S. Oct. 12, 1979) (No. 79-608) 2

Thomas v. State, 313 S.W.2d 311 (Tex.Crim. App. 1958) 14

United States v. Augenblick, 383 U.S. 348 (1969) 15

United States v. Rumpf, 576 F.2d 818 (10th Cir. 1976), *cert. denied*, ___U.S.___, 99 S.Ct. 251 (1978) 9

United States v. Block, 590 F.2d 535 (4th Cir. 1978) 8

Waller v. Florida, 397 U.S. 387 (1970) 8, 9, 10

Zollicoffer v. State, 16 Crim.Rep. 312 (Tex.Ct.App. 1884) 14

STATUTES

TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon) 2-5, 13

TEX. CODE CRIM. PROC. ANN. art. 38.17 (Vernon) 3, 13

TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon) 3, 10, 13

28 U.S.C. §1257(3) 2

OTHER AUTHORITIES

Comment, 31 U.CHI.L.REV. 365 (1964) 8

23 C.J.S. *Criminal Law* §812(2) (1961) 15

Rule 23(5), Rules of the Supreme Court of the United States 1

Table, 541 S.W.2d 625 4

7 WIGMORE, *Evidence*, §2056 (Chadbourn rev. 1978) 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

THE STATE OF TEXAS,

Petitioner

V.

EDITH REYNOLDS
AND
RUBEN COLUNGA,

Respondents

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

* * *

The Petitioner State of Texas respectfully prays that a writ of certiorari issue to review the judgments of the Texas Court of Criminal Appeals entered in these two proceedings[1] on September 19, 1979, and October 10, 1979, respectively.

OPINIONS BELOW

The presently unreported opinion of the Texas Court of Criminal Appeals in *Ex parte Reynolds*, No. 60,647 (Tex.Crim.App., June 20, 1979), *reh. denied*, Sept. 19, 1979, is reproduced in the Appendix hereto as "A." The opinion of the Texas Court of Criminal Appeals in *Ex parte Colunga*, 587 S.W.2d 426 (Tex.Crim.App. 1979) appears in the Appendix as "B."

---

[1]The parties are listed together in one caption pursuant to Rule 23(5), Rules of the Supreme Court of the United States.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals in *Ex parte Reynolds* was entered on June 20, 1979. A timely filed motion for rehearing was denied on September 19, 1979.

The judgment of the Texas Court of Criminal Appeals in *Ex parte Colunga* was entered on October 10, 1979.

This petition for writ of certiorari was filed within ninety days after final judgment in each of these cases. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether this Court's decisions in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151 (1978), that the Double Jeopardy Clause of the Constitution bars retrial and conviction following an initial appellate reversal for insufficient evidence, should be applied retroactively?[2]

Whether *Burks* and *Greene* bar retrial following an appellate reversal for evidentiary error under a state statute requiring corroboration of accomplice witness testimony?

STATUTORY PROVISIONS INVOLVED

TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon)

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense

[2]This issue, as well as portions of the Argument below, is identical to the sole issue presented by the petition for writ of certiorari in *The State of Texas v. Donald Gene Mixon & Weldon C. Dixon*, No. 79-608, filed October 12, 1979. A motion for consolidation was filed with the instant petition.

committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

TEX. CODE CRIM. PROC. ANN. art.38.17 (Vernon)

In all cases where, by law, two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction.

TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon)

The Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts. A cause reversed because the verdict is contrary to the evidence shall be remanded for a new trial.

STATEMENT OF THE CASES

Respondent Edith Reynolds was originally convicted in Kinney County, Texas, for murder with malice. On appeal, the conviction was reversed because of insufficient corroboration of the accomplice witness testimony[3] under TEX. CODE CRIM. PROC. ANN. art.

[3]The corroborating evidence held to be insufficient was set forth in the opinion of Judge Douglas, dissenting to denial of the State's motion for rehearing:

> In the present case, Edith Reynolds and her daughter, Linda Smith, lived with James Reynolds, the deceased, in a trailer home. The officers found there had been foul play in the bedroom of the trailer home. Type A human blood, the same as that of Reynolds, was found. Human hair and blood were found on the ceiling. A table which contained Type A blood spots on it had been repainted. Human bone fragments were found in the bedroom.
>
> An automobile registered in the name of Edith Reynolds was found some distance from the trailer home stuck in mud by a creek. The automobile jack in the trunk of the car contained Type A human blood. Apparently there had been an

38.14 (Vernon). *Reynolds v. State*, 489 S.W.2d 866 (Tex.Crim.App. 1972). Following a change of venue, respondent was retried in Val Verde County and again convicted of murder with malice. She received a sentence of thirty-five years. On appeal, the Texas Court of Criminal Appeals rejected the contention, among others, that the evidence was insufficient, and the Court affirmed the judgment in an unpublished per curiam opinion entered on October 20, 1976. *See* Table, 541 S.W.2d 625.

---

attempt to remove this blood. Hair was found on the rear bumper of the car. This was not positively identified as James Reynolds' hair but was similar to it.

Bone fragments found embedded in the brain of the deceased were similar to those found in the bedroom of the trailer.

Edith Reynolds asked June Slaven to help her drown James Reynolds and stated that he could not swim and that they could get him in a boat and then into the water.

Jesse Mendez testified that Edith Reynolds asked him several times if he wanted to make $10,000 by killing her husband. She stated that she wanted to collect his life insurance. It was shown that Edith Reynolds was the primary beneficiary in the policies.

After the homicide, Edith Reynolds attempted suicide. From this the jury could, and possibly did, draw the conclusion that this was a circumstance showing guilt.

In the present case the motive was proved by two non-accomplice witnesses, June Slaven and Jesse Mendez. She wanted her husband dead and wanted the insurance money. Blood of the type of the deceased was found in the trailer home. Fragments of bones were found in the bedroom. Attempts had been made to remove the blood spots. The same type of blood was found in Edith Reynolds' car as was found in her bedroom and upon her repainted table. The same type of bond fragments were found embedded in the brain of the deceased as those found in the bedroom.

Reynolds v. State, 489 S.W.2d 866, 873-74 (Tex.Crim.App. 1972).

Subsequently respondent sought habeas corpus relief in the state courts. The Texas Court of Criminal Appeals granted such relief on June 20, 1979, on the basis of this Court's holdings as in *Burks* and *Greene*. The State's timely filed motion for rehearing was denied on September 19, 1979. This petition for writ of certiorari followed.

Respondent Ruben Colunga was originally convicted of murder in July, 1970, in Bexar County, Texas. The conviction was reversed by the Texas Court of Criminal Appeals on January 11, 1972, for insufficiency of the evidence to corroborate the testimony of an accomplice witness[4] as required by TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon). *Colunga v. State*, 481 S.W.2d 866 (Tex.Crim.App. 1972). In September, 1973, respondent was retried and reconvicted of murder in Bexar County. The Texas Court of Criminal Appeals on

---

[4]The corroborating evidence held to be insufficient is as follows:

The State's principal non-accomplice witness, Ernest Lopez, by whom it intended to place appellant near the scene and in the company of his co-defendants prior to the murder, testified that he knew the man, known to him as Tony, was Ruben Colunga but that he had never seen him before the day of the trial and, therefore, could not identify him as the man in the car on the night of the murder. The State claimed surprise and sought to impeach him stating he had told them he saw Colunga, known to him as Tony, in a car with the others on the night in question and that Colunga asked him for a pistol to use on a job. The State also introduced an affidavit Lopez gave to the police shortly after the incident where he also stated a man, known to him only as Tony, drove up to him in a car on the night of the murder and asked for the pistols. Lopez admitted the claimed conversations and signing the affidavit but still continued to deny he knew the appellant.

The State further showed that an offense was committed, that the fingerprints of appellant's co-defendants were found in the establishment and that appellant was at a cafe later in the evening with a co-defendant and an accomplice witness.

Colunga v. State, 481 S.W.2d 866, 868 (Tex.Crim.App. 1972).

October 10, 1975, affirmed the conviction. *Colunga v. State*, 527 S.W.2d 285 (Tex.Crim.App. 1975).

Subsequently, respondent filed a state petition for writ of habeas corpus that was ultimately granted by the Texas Court of Criminal Appeals on October 10, 1979. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. THE TEXAS COURT OF CRIMINAL APPEALS INCORRECTLY HELD FULLY RETROACTIVE THIS COURT'S DECISIONS IN *BURKS V. UNITED STATES* AND *GREENE V. MASSEY*.

2. THE TEXAS COURT OF CRIMINAL APPEALS INCORRECTLY HELD THAT *BURKS* AND *GREENE* BAR RETRIAL FOLLOWING AN APPELLATE REVERSAL FOR EVIDENTIARY ERROR UNDER A STATE STATUTE REQUIRING CORROBORATION OF ACCOMPLICE WITNESS TESTIMONY BECAUSE UNDER THE CONSTITUTIONAL STANDARD SET FORTH IN *JACKSON V. VIRGINIA*, A RATIONAL TRIER OF FACT COULD HAVE FOUND RESPONDENTS GUILTY UPON THE BASIS OF THAT UNCORROBORATED TESTIMONY.

3. THE RETROACTIVITY AND SCOPE OF *BURKS* AND *GREENE* ARE QUESTIONS OF NATIONAL IMPORTANCE.

A. Unless these Cases Are Held to Be Prospective or their Scope Limited, the Number of Prisoners Who May Receive Drastic Relief -- Outright Release -- is Substantial Even Though All Are Now Imprisoned as a Result of an Otherwise Constitutionally Impregnable Conviction.

B. This Case Presents a Significant Opportunity to Diminish the Unfair Impact of this Court's Recent Decision in *Jackson v. Virginia*.

ARGUMENT

I. THE TEXAS COURT OF CRIMINAL APPEALS INCORRECTLY HELD FULLY RETROACTIVE THIS COURT'S HOLDINGS IN *BURKS V. UNITED STATES* AND *GREENE V. MASSEY*.

In *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151 (1978), this Court overruled a long line of its own authorities in order to hold that the Double Jeopardy Clause of the United States Constitution bars retrial of a criminal defendant who has obtained an appellate reversal of his conviction because of insufficiency of the evidence. The Court reasoned that if the evidence were legally insufficient at trial, then theoretically the case should never have been submitted to the jury at all, but instead any defendant who at the close of the State's evidence moved for an instructed acquittal would have been entitled to one.

For this reason, the Court held that all defendants are entitled to the double jeopardy benefits of the State's failure to present sufficient evidence at its initial opportunity. The Court, however, failed to rule explicitly whether its holdings would apply retroactively so as to invalidate the convictions of all defendants who had already been retried and reconvicted in criminal proceedings supported by

sufficient evidence and free of any other constitutional infirmity.[5]

The criteria for determining retroactivity of double jeopardy decisions were set out in *Robinson v. Neil*, 409 U.S. 505 (1973). At issue there was the retroactivity of the double jeopardy holding in *Waller v. Florida*, 397 U.S. 387 (1970).

The Supreme Court noted that the analysis embodied in *Linkletter v. Walker*, 381 U.S. 618 (1965), which is based upon protecting "the very integrity of the fact-finding process,"[6] *id.* at 639, is "not appropriate" in the context of double jeopardy decisions, *Robinson v. Neil* at 509. The Court continued to emphasize, however, the "element of reliance embodied in the *Linkletter* analysis ...."

[5]It is worth noting that there are numerous reasons why the State during a second prosecution might adduce constitutionally sufficient evidence after failing to do so during the first. Of minor importance is the possibility that the passage of time might produce additional evidence of guilt. More significantly, the State often possesses inculpatory and even damning evidence that it chooses not to introduce because it may be held inadmissible on appeal. The evidence may be a fruit of a search that the State fears will ultimately be held improper, or of a confession that might on appeal be held coerced. The evidence may be of arguable but less than certain admissibility for many other reasons that may cause the prosecution to seek a conviction without it.

It is also possible that the State may withhold weak but legally sufficient evidence because it chooses to rely in good faith but erroneously upon evidence that ultimately on appeal is held to be inadmissible. *See United States v. Block*, 590 F.2d 535, 540 n.12 (4th Cir. 1978); Comment, 31 U.CHI.L.REV. 365 (1964).

[6]This analysis, as summarized in *Stovall v. Denno*, 388 U.S. 293, 297 (1967) emphasizes the purpose to be served by the new standrds, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. *Desist v. United States*, 394 U.S. 244, 249 (1969).

Thus, the Court, cautioning against the view that its rule of decision "is an ironclad one that will invariably result in the easy classification of cases in one category or another,[7] *id.* at 509, established a two-prong good faith reliance and prejudice test. This test focuses first on whether the State's reliance on the prior rule was supported by case law such that the new constitutional decision "marked a departure from past decisions of this [Supreme] Court." *Robinson v. Neil* at 511. If so, the State's reliance upon earlier constitutional decisions, both state and federal, would obviously be in good faith. Second, the Court felt it important to examine the nature and form of the prejudice the State would suffer from retroactive application of the constitutional rule and the extent of the unfairness of such prejudice, compared to the beneficial effect upon the valid interests of defendants in such retroactive application.

Applying this test to the facts before it, the Supreme Court held *Waller v. Florida* retroactive, stating first that "[the] decision in *Waller* cannot be said to have marked a departure from past decisions of this Court." *Robinson v. Neil* at 510. The Court in effect held that the State should have realized that municipalities and states were sufficiently parts of one sovereign such that

[7]Indeed, in five of the most recent double jeopardy-retroactivity cases located by the State, three held a Supreme Court double jeopardy decision to be retroactive, and two refused to do so. In *Mizell v. Attorney General of New York*, 586 F.2d 942 (2d Cir. 1978), *cert. denied*, ___U.S.___, 99 S.Ct. 1519 (1979), this Court's decision in *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156 (1978), was held retroactive. In *Holt v. Black*, 550 F.2d 1061 (6th Cir.), *cert. denied*, 432 U.S. 910 (1977), the Court held *Breed v. Jones*, 421 U.S. 519 (1975), retroactive, whereas a contrary conclusion was reached in *Jackson v. Justices of Superior Court of Mass.*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977). In *United States v. Rumpf*, 576 F.2d 818 (10th Cir. 1976), *cert. denied*, ___U.S.___, 99 S.Ct. 251 (1978), the decision in *Abney v. United States*, 431 U.S. 651 (1977), was held to be prospective only. Finally, in *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975), the Fifth Circuit afforded full retroactive status to the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970).

criminal prosecution by one would bar later criminal prosecution by the other -- the essential holding of *Waller v. Florida.*

By contrast, the decisions of the Supreme Court in *Burks v. United States* and *Greene v. Massey* marked a significant departure from prior decisions. The Court itself admitted, "The Court's holdings in this area, beginning with *Bryan*, can hardly be characterized as models of consistency and clarity." *Burks v. United States*, 437 U.S. at ___, 98 S.Ct. at 2146. The Court further admitted, "To reach a different result [from the Court of Appeals] will require a departure from the [earlier] holdings." *Id.* To settle the matter, the Court stated:

> "[O]ur past holdings do not appear consistent with what we believe the Double Jeopardy Clause commands. A close re-examination of those precedents, however, persuades us that they have not properly construed the Clause, and accordingly, should no longer be followed."

Id. at ___, 2147. Obviously, the law in this area before *Burks* and *Greene* -- especially insofar as whether seeking an appeal constituted a waiver of a criminal defendant's double jeopardy rights -- was on balance contrary to the newly announced constitutional rule.

Texas law for decades has mirrored federal law in this respect. In a long and unbroken line of cases implementing TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon), and its statutory predecessors, the Texas Court of Criminal Appeals has held that a defendant might be retried for the same offense following a reversal for insufficient evidence.[8] Thus,

[8]After *Burks* and *Greene* the Court of Criminal Appeals held Article 44.25 unconstitutional to the extent of conflict with this Court's decisions. *Johnson v. State*, 571 S.W.2d 4, 6 n.2 (Tex.Crim.App. 1978).

under *Robinson v. Neil*, good faith reliance by Texas law enforcement authorities is shown.

Clearly, good faith detrimental reliance could well have been a reality in many cases such as respondents', and in two ways. First, for example, if respondents might have been tried upon other charges following their first convictions, but the State in good faith believed that they might also validly be retried upon the same charge for which a reversal of the conviction had been obtained, good faith reliance would be shown. Through no fault of the State, respondents could not now be retried for any of such charges, the applicable statutes of limitations having long ago expired.

Second, there are many reasons why there might have been additional evidence that might have been introduced at respondents' trials, but that was excluded for a variety of reasons. *See* footnote five, *supra.* The State should not be forever deprived of this evidence because of a strategic judgment founded upon a good faith, but erroneous, view of the law.

It should be emphasized that these respondents do not present issues in which doubt has been cast upon the accuracy of the guilty verdict in their second trials. In *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) [quoted and emphasis added in *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977)], the Court stated as follows:

> "Where the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth- finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice

has sufficed to require prospective application in these circumstances." [citations omitted]

The major purpose of double jeopardy doctrine is not to protect the integrity of the fact-finding process; instead, it is to preclude the State from harassment of an individual by repeated attempts to incarcerate him. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969); *Green v. United States*, 355 U.S. 184, 187-88 (1957). Indeed, it is fundamental to principles of double jeopardy that it is preferable that a guilty man go free than be subjected to a forbidden second prosecution.

For these reasons, a question as to the accuracy of a guilty verdict based upon legally insufficient evidence is a sound basis for ordering an acquittal upon direct appeal from such a verdict, as this Court did in *Burks* and *Greene*, and as the Texas Court of Criminal Appeals did in *Johnson v. State*, 571 S.W.2d 4 (Tex.Crim.App. 1978). In the instant cases, however, any such question has been obviated or minimized by the subsequent retrials of respondents and the presentation of additional evidence that is legally sufficient to sustain their convictions. Since it is no longer possible to prevent the second prosecution and because respondents now stand validly convicted upon legally sufficient evidence, *Burks* and *Greene* should be held prospective only in their application.

II. *BURKS* AND *GREENE* DO NOT BAR RETRIAL FOLLOWING AN APPELLATE REVERSAL FOR EVIDENTIARY ERROR UNDER A STATE STATUTE REQUIRING CORROBORATION OF ACCOMPLICE WITNESS TESTIMONY BECAUSE UNDER THE CONSTITUTIONAL STANDARD SET FORTH IN *JACKSON V. VIRGINIA*, A RATIONAL TRIER OF FACT COULD HAVE FOUND RESPONDENTS

GUILTY UPON THE BASIS OF THAT UNCORROBORATED TESTIMONY.

After each respondent was initially convicted, his case was reversed and remanded for a new trial under the authority of two Texas statutes of common but not universal usage nationally. Respondent Colunga's conviction for murder was reversed because the Texas Court of Criminal Appeals held that there was insufficient evidence to corroborate the testimony of two accomplices who testified at trial that Colunga was the mastermind behind their savage and unprovoked murder-robbery that netted two dollars in booty. *Colunga v. State*, 481 S.W.2d 866 (Tex.Crim.App. 1972). *See* footnote 4, *supra*. Similarly, respondent Reynolds obtained a reversal after the Court of Criminal Appeals concluded that there was insufficient corroboration of her daughter's vivid, detailed account of how her mother and another man had murdered her stepfather and induced her to help conceal the evidence. *See* footnote 3, *supra*.

The Court of Criminal Appeals in these cases held that TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon), precluding conviction upon the insufficiently corroborated testimony of an accomplice witness, required reversal. In spite of the language of TEX. CODE CRIM. PROC. ANN. art. 38.17 (Vernon), which seems to require the trial judge to instruct a verdict of acquittal if accomplice witness testimony is not sufficiently corroborated, the Court of Criminal Appeals remanded the cases for new trials. *Reynolds v. State*, 489 S.W.2d 866, 873 (Tex.Crim.App. 1972); *Colunga v. State*, 481 S.W.2d 866, 869 (Tex.Crim.App. 1972).

In *Colunga*, the court cited as authority for the remand both the statutory requirement of TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon), and a long and unbroken line of case law authority dating back to the

earliest days of the Republic of Texas. *See Colunga v. State*, 481 S.W.2d at 869, and numerous cases there cited, as well as *Johnson v. State*, 33 Tex. 570 (Tex. 1870); *Lopez v. State*, 34 Tex. 133 (Tex. 1871); *Cox v. State*, 13 Crim. Rep. 479 (Tex.Ct.App. 1883); *Zollicoffer v. State*, 16 Crim.Rep. 312 (Tex.Ct.App. 1884); *Dodson v. State*, 6 S.W. 548 (Tex.Ct.App. 1887); *Johnson v. State*, 88 S.W.2d 108 (Tex.Crim.App. 1935); *Roberd v. State*, 276 S.W.2d 270 (Tex.Crim.App. 1955); *Thomas v. State*, 313 S.W.2d 311 (Tex.Crim.App. 1958); *Dalrymple v. State*, 366 S.W.2d 576 (Tex.Crim.App. 1963); and *Harris v. State*, 524 S.W.2d 65 (Tex.Crim.App. 1975).

In the instant cases, the Court of Criminal Appeals erroneously held that *Burks* and *Greene* require overruling all this precedent. In a concurring opinion to *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 2156, Mr. Justice Rehnquist cautioned against the overbroad and unreasoned application of the holding in *Burks* and *Greene*:

> "I would want to emphasize more than the Court does in its opinion the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the 50 different States in the Union. Thus, to the extent that Florida practice in this regard differs from practice in the federal system, the impact of the Double Jeopardy Clause may likewise differ with respect to a particular proceeding."

The import of Mr. Justice Rehnquist's admonition suggests a different result in the instant case.

Principles of due process of law require that there be sufficient evidence to support a criminal conviction. The Constitution is offended "if it is found that upon the record evidence adduced at the trial no rational trier of

fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. ___, 99 S.Ct. 2781, 2792 (1979). Thus, under the reasoning of *Burks* and *Greene*, the Constitution requires that a judgment of acquittal be entered after the State has once placed a criminal defendant in jeopardy but failed to adduce generally sufficient evidence of his guilt upon all "substantive elements of the criminal offense as defined by state law." *Jackson v. Virginia* at ___, 2792 n.16.

Lack of corroboration of an accomplice witness, however, raises none of these issues. The testimony of the accomplice itself satisfies the constitutional requirement of evidence that, if believed, would be sufficient to cause a rational trier of fact to return a verdict of guilty. Any statutory requirement of additional corroborating evidence involves no constitutional question. This Court has specifically so held. *United States v. Augenblick*, 383 U.S. 348, 352 (1969); *see Caminetti v. United States*, 242 U.S. 470, 495 (1917).

Apparently only twenty states have enacted statutes like Texas' precluding conviction upon uncorroborated accomplice witness testimony. *See* 7 WIGMORE, *Evidence*, §2056 at 414-16 n.10 (Chadbourn rev. 1978). Such a rule of exclusion was unknown at common law. *Id.*, §2056 at 408; 23 C.J.S. *Criminal Law* §812(2) *et seq.* (1961).

Burks and *Greene* require that an acquittal be entered by an appellate court upon a conviction for evidence generally insufficient in the constitutional sense discussed in *Jackson v. Virginia* or in any case where there is insufficient evidence upon an element of the offense charged from which a rational trier of fact might infer guilt. Where there is such evidence, but a state has chosen to exceed constitutional evidentiary requirements, that state should be free to afford the remedy it believes to be most appropriate under the circumstances. In short, Petitioner cannot understand

how it could be said that no rational trier of fact could find respondents guilty when such trier of fact in thirty states and the federal criminal system would be free to reach precisely that conclusion! It follows that the Constitution does not require dismissal of the indictment under the circumstances of these cases.

Indeed, the remedy of a remand for new trial is a fair compromise in these circumstances between the competing interests of the defendant and the State. That is, an acquittal would be an unjustified and undeserved windfall to a criminal defendant who had received the benefit of a rule designed scrupulously to protect him from being convicted upon the uncorroborated testimony of a potentially biased accomplice. The State, on the other hand, while prohibited in some jurisdictions from obtaining a valid conviction in such a manner, would nevertheless be able in this context, as in any other context involving ordinary evidentiary error, to correct the mistake upon retrial. Common sense and principles of fundamental fairness suggest that a new trial is the proper remedy. The Constitution requires no more.

These principles are particularly telling in the instant cases. It is apparent from the discussion of the evidence in *Colunga v. State*, 481 S.W.2d 866 (Tex.Crim.App. 1972) and *Colunga v. State*, 527 S.W.2d 285 (Tex.Crim.App. 1975), for example, that the trial court at respondent's first trial *erroneously* instructed the jury that the State's witnesses were accomplices as a matter of law.

The defect was remedied, however, at the second trial because the jury was *properly* instructed that it must determine as a fact question whether the State's witnesses were accomplices. This question was correctly resolved adversely to respondent according to the opinion of the Court of Criminal Appeals in *Colunga*, *supra*, 527 S.W.2d at 287.

Obviously, to hold now that respondent Colunga's second trial was barred would be an unjustified windfall to respondent, who has already received the benefit of a second trial.

The defect at his first trial was evidentiary in nature, not one of general insufficiency of the evidence. To hold that respondent is now entitled to his freedom would hold in effect that the Constitution bars retrial after an erroneous evidentiary ruling *in respondent's favor* was committed at his first trial. Nothing in *Burks* or *Greene* mandates such an unjust result.

III. THE RETROACTIVITY OF *BURKS* AND *GREENE* ARE QUESTIONS OF NATIONAL IMPORTANCE.

A. Unless These Cases Are Held To Be Prospective or Limited in Scope, the Number of Prisoners Who May Receive Drastic Relief -- Outright Release -- is Substantial, Even Though All Are Now Imprisoned as a Result of an Otherwise Constitutionally Impregnable Conviction.

The questions presented are important in two ways. First, as a result of the opinion below, every Texas prisoner convicted upon retrial following appellate reversal for insufficient evidence at his first trial must be released, even though the State under applicable statutes of limitations has lost any right to retry such a prisoner on other or lesser included charges due to the passage of years or even decades. The effect of this decision upon Texas and other states simply in terms of the number of prisoners potentially entitled to release is so great that this Court's attention to the matter is warranted.

This is not a case in which the interests of only a few prisoners have been determined, nor is it a case which can be characterized as unique in the set of

circumstances resulting in the invalidation of a conviction. Rather, the holding in this case requires the release of a group of prisoners who have been found guilty of diverse criminal acts, including the most serious felonies, and as to which any doubt as to the accuracy of these convictions and the factual guilt of the convicted defendants was resolved at the second trial.

Because these convictions were pursued and obtained routinely under a standard of criminal procedure which had been approved by both federal and state court decisions, including decisions of this Court, the number of such prisoners in the Texas Department of Corrections is large. There are surely far more, of course, nationally.

Second, this Court should seize this opportunity to resolve the obvious uncertainties among all the states and the federal courts as to the scope of the applicability of *Burks* and *Greene*. The virtual certainty of contradictory holdings among these jurisdictions is not an appealing one for the sound and equal administration of justice. The Court should now resolve all doubts and decide whether *Burks* and *Greene* are retroactive.

B. This Case Presents A Significant Opportunity to Diminish The Unfair Impact Of This Court's Decision In *Jackson v. Virginia.*

In *Jackson v. Virginia*, 443 U.S. ___, 99 S.Ct. 2781 (1979), this Court held that a federal habeas corpus petitioner may challenge the sufficiency of the evidence in his state criminal trial. The Court, as in the instant case, gave no explicit guidance as to the retroactivity of its holding. Such a retroactive application of *Jackson* would have a profoundly adverse effect upon the administration of justice, unless tempered by a holding that *Burks* and *Greene* are prospective only. Petitioner's reasoning follows.

To hold *Burks* and *Greene* prospective only would mean that in any case where the constitutional wrong -- *i.e.*, failure to grant the defendant a directed verdict of acquittal at the close of the evidence at the original trial -- occurred prior to June 14, 1978, the date of decision in *Burks* and *Greene*, retrial was permissible. The import of such a holding in relation to *Jackson v. Virginia* would be to allow retrial now of many habeas petitioners who are found to have been convicted upon insufficient evidence. Whenever the constitutional wrong as stated above occurred in such a case prior to June 14, 1978, such a retrial would be permissible.

The instant case, therefore, presents an excellent opportunity for the Court to lessen the unfair impact of an important portion of its holding in *Jackson v. Virginia.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decisions of the Texas Court of Criminal Appeals.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General

DOUGLAS M. BECKER
Assistant Attorney General

THOMAS F. LEE
District Attorney
63rd Judicial District
Del Rio, Texas 78840

BILL M. WHITE
Criminal District Attorney
Bexar County
San Antonio, Texas 78204

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

APPENDIX

APPENDIX A

Ex parte Edith REYNOLDS.

No. 60647

Court of Criminal Appeals of Texas,
En Banc.

June 20, 1979.

Rehearing Denied September 19, 1979.

OPINION

This is a post-conviction habeas corpus application filed pursuant to Art. 11.07, V.A.C.C.P.

Appellant is serving a thirty-five year sentence for the murder of her husband. She was first tried in 1970 in Kinney County and sentenced to life. On appeal her conviction was reversed because the evidence was insufficient to corroborate the testimony of her daughter who was an accomplice witness in the case. Reynolds v. State, 489 S.W.2d 866. After remand she was convicted in a second trial in October 1973 after a change of venue to Val Verde County and sentenced to thirty-five years. On appeal that conviction was affirmed in a per curiam opinion. Petitioner now contends her second trial after the first conviction was reversed for insufficient evidence constituted a violation of her constitutional protection against double jeopardy, as recently held in Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15.

The State challenges petitioner's request for relief with two arguments. First, it is asserted that insufficient evidence to corroborate an accomplice witness under Art. 38.14, V.A.C.C.P., does not constitute insufficient evidence to support the conviction under the Burks-Greene rule. Second, the

State argues that the Burks-Greene rule should not be given retroactive application.

In Burks v. United States, supra, the Court reviewed its prior decisions in the area of the double jeopardy protection and the power to retry a defendant after reversal on appeal. In resolving "the present state of conceptual confusion existing in this area of the law" the Court concluded:

> "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. . . . .
>
> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal--no matter how erroneous it decision--it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law

> that the jury could not properly have returned a verdict of guilty."

The State apparently contends that insufficient evidence to corroborate an accomplice witness is in the class of "trial error" instead of "failure of proof." The State also calls attention to the concurring opinion of Justice Rehnquist, in which he took the opportunity to emphasize "the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the 50 different states in the Union."

We agree the requirement that the testimony of an accomplice witness be corroborated is a practice in this State that varies from that of many others. It does not follow, however, that error under this rule is mere "trial error" as distinguished from "failure of proof." Art. 38.17, V.A.C.C.P., cited in petitioner's brief filed in response to the State's first brief, provides:

> "In all cases where, by law, two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction."

Thus, under this statute, insufficient evidence to corroborate an accomplice witness requires a verdict of acquittal. As quoted above from *Burks*:

> "Since we necessarily afford absolute finality to a jury's *verdict* of acquittal . . . it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty."

In this jurisdiction, when the evidence is insufficient to

corroborate an accomplice witness, the jury cannot properly return any verdict except an acquittal. We therefore hold that the Burks-Greene rule does apply to cases in which the evidence is insufficient to corroborate the testimony of the accomplice witness.

We now turn to the issue of whether the Burks-Greene rule should be given retrospective application. In Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29, the Court considered whether the double jeopardy doctrine announced in Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435, should be given retroactive effect, and held that it should.

In *Robinson* the Court stated that the three-pronged test[1] of Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601, cannot be rigidly applied to double jeopardy issues:

> "The prohibition against being placed in double jeopardy is likewise not readily susceptible of analysis under the *Linkletter* line of cases . . .
>
> "*The guarantee against double jeopardy is significantly different from procedural guarantees held* in the *Linkletter* line of cases *to have prospective effect only.* While this guarantee, like the others, is a constitutional right of the criminal defendant, *its practical result is to prevent a trial from taking place at all,* rather than to prescribe procedural rules that govern the conduct of a trial. . . [T]he Court's ruling [in Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435] was squarely directed to the prevention of the

[1]These three prongs, as succinctly stated in Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248, are (1) the purpose of the rule, (2) the extent of law enforcement reliance on the old rule, and (3) the effect of retroactive application on the administration of justice.

> second trial's taking place at all, even though it might have been conducted with a scrupulous regard for all of the constitutional procedural rights of the defendant." (Emphasis added.) 409 U.S. at 508-09.

Likewise, *Burks* and *Greene* were "squarely directed to the prevention of the second trial's taking place at all."

The State in its brief takes the position that *Robinson* in effect established a retroactivity test for double jeopardy holdings that looks only to the last two prongs of the three prong test of *Linkletter.* We believe that position misreads *Robinson.* Instead of emphasizing the "reliance" prong of *Linkletter, Robinson* simply stated, "The element of reliance embodied in the *Linkletter* analysis *will not be wholly absent* in the case of constitutional decisions not related to trial procedure. . . ." (Emphasis added.) We construe this phrasing to indicate that the reliance component, while not wholly absent, will be of lesser significance in the double jeopardy area. We therefore look to see what role the reliance prong played under *Linkletter.*

In Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248, the three prongs of *Linkletter* and their relative roles were described in this language:

> "As we most recently summarized them in Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199, 'The criteria guiding resolution of the question [of retroactivity] implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards.'
>
> "*Foremost among these factors is the purpose to be served by the new constitutional rule. . . .*

> ". . . we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."

Thus, under *Linkletter*, the purpose of the new rule is of primary significance, and the other two prongs are heavily relied on only when the purpose of the rule does not clearly favor either retroactivity or prospectivity. *Robinson* does not appear to accord any weight to the third prong, or at least none beyond what is incorporated into the second.

What then is the purpose of the Burks-Greene rule and does it clearly favor retroactivity or prospectivity? The Burks-Greene decisions stand for the rule that a defendant's appeal or request for a new trial does not "waive" his right to an acquittal. The necessary prerequisite to application of the rule is that the defendant show he was entitled to an acquittal. Once such a showing is made it necessarily follows that the State is barred from subjecting him to a second trial. This is wholly unlike the issue of retroactivity where the alternatives are whether the State can obtain a conviction without observation of the new rule, or must seek a conviction, if any, in compliance with the new rule. The issue under *Burks-Greene* is whether the State should be allowed a post-acquittal conviction, and no changes in the rules for obtaining it are implicated. As stated in *Burks*, "Given the requirements for entry of a judgment of acquittal, the purposes of the Clause would be negated were we to afford the Government an opportunity for the proverbial 'second bite at the apple.' " The purpose of the rule clearly points to retroactive application.

Since under *Robinson* "the element of reliance embodied in the *Linkletter* analysis" is not "wholly absent," we must ask whether it is of sufficient gravity

to outweigh the clear purpose of the rule. It is true, as stated in *Burks* itself, that the Court's prior holdings in the area "can hardly be characterized as models of consistency and clarity." On the other hand, what prejudice would the State suffer from retroactive application of the new rule as a result of its reliance on the old rule? The prejudice in retroactive application of procedural rules arises primarily from the denial of use of evidence and the burden of retrial. No such prejudice would accompany a retroactive application of the Burks-Greene rule simply because it would bar rather than require a retrial, and it in no way affects what evidence the State may use. The State in its brief suggests prejudice "if petitioner might have been tried upon other charges following [her] first conviction," but the State abandoned any such other prosecutions to reprosecute the reversed case. We find such prejudice to be too speculative in nature. If this were sufficient to bar retroactive application, then all rules would be prospective only. Also, as stated in *Burks* itself:

> "[T]he prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble."

In sum, we find no demonstrable prejudice to the State despite good faith reliance on the old rule.

The rule is not one that creates a jeopardy bar after proceedings that do not afford the State even one "bite at the apple," (see, Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779; Crist v. Bretz, ___U.S.___, 98 S.Ct. 2156), and we express no opinion as to the retroactivity vel non in such cases. In every case to which the Burks-Greene rule could apply, past or future, the State is not denied its opportunity to take one "bite at the apple." We hold the rule should be given full retroactive application and that petitioner is entitled to relief.

The judgment against petitioner in cause 1519 in the 63rd Judicial District Court of Kinney County (petitioner's first conviction) is ordered reformed to show an acquittal, the judgment against her in cause 3671 in the 63rd Judicial District Court of Val Verde County (petitioner's second conviction after a change of venue from Kinney County) is set aside, and she is ordered discharged from any further confinement under said judgment. A copy of this opinion will be sent to the Texas Department of Corrections.

It is so ordered.

ODOM, Judge

Onion, P.J. and Clinton, J. concur

DISSENTING OPINION

The majority asks the wrong question and necessarily arrives at the wrong answer.

New interpretations of the double jeopardy clause are not per se retroactive. See Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973); Jackson v. Justices of the Superior Court of Massachusettes, 549 F.2d 215 (1st Cir.) cert. denied, 430 U.S. 975, 97 S.Ct. 1666, 52 L.Ed.2d 370 (1977). However, the traditional retroactivity test outlined in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), is not readily applicable to non-procedural rights. Recognizing this, the Supreme Court, in Robinson v. Neil, supra, has applied a more flexible test for determining retroactivity. Although, as the *Robinson* Court candidly concedes:

> "We would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other."

The majority correctly interprets the flexible rule utilized in *Robinson;* however, in applying it to these facts, they misstate the issue as "whether the State should be allowed a post-acquittal conviction." The issue can be better framed by looking at the ultimate purpose of the protection against double jeopardy. The purpose underlying the decisions in *Burks* and *Greene* is, as the majority earlier observes, " 'squarely directed to the prevention of the second trial's taking place at all.' " In a similar light, the Supreme Court stated the purpose of the protection against double jeopardy as follows:

> "It is a guarantee against being twice put to *trial* for the same offense * * * the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977)."

This purpose, of preventing the second trial, can be fully accomplished prospectively.[1] It cannot be accomplished after the second trial has occurred. We must, therefore, approach the instant case by acknowledging that the double jeopardy clause, as currently interpreted, has been violated. The proper question concerning retroactivity, in keeping with the flexible approach used in *Robinson* is: What interest, that is protected by the Double Jeopardy Clause, can not be furthered by granting relief in a collateral attack upon an otherwise valid conviction.

---

[1]Since the decisions in *Burks* and *Greene*, when we reverse a conviction for insufficient evidence, we order a judgment of acquittal. E.g., Owens v. State, 576 S.W.2d 859 (Tex.Cr.App. 1979). The federal courts allow an interlocutory appeal from the district court's denial of a motion asserting double jeopardy. Abney v. United States, supra. Thus, both our Court and the federal courts recognize the importance of preventing the second trial.

In considering this issue, we must recognize that our federal constitution contains several evolving concepts that have been and continually will be reinterpreted by the Supreme Court. Retrial of the instant petitioner did not violate the Double Jeopardy Clause in 1973. The subsequent conviction was obtained in good faith and with sufficient evidence. Petitioner has already suffered the consequences of the second trial process. Double jeopardy does not effect the validity of the fact finding process. Thus, the only possible interest which could be furthered by retroactivity would be to elevate the Double Jeopardy Clause to the highest magnitude of constitutional rights such that any violation of it is so fundamental that it requires full and automatic retroactive application. We have not even accorded our Fourth Amendment protections, against arbitrary government searches, such a lofty position. Linkletter v. Walker, supra. The Supreme Court in *Robinson* held that the Double Jeopardy Clause did not protect such a fundamental right, and there is no reason to elevate the protection beyond the current Supreme Court interpretations. No other interest, constitutional or otherwise, will be furthered by now allowing petitioner to escape the consequences stemming from a conviction which was constitutionally and legally obtained in 1973.

The reversal of the original conviction was an error of law on the part of the majority of the Court. See the original and dissenting opinions in Reynolds v. State, 489 S.W.2d 866 (Tex.Cr.App. 1970). There was sufficient evidence in that case to support the conviction with or without the testimony of an accomplice witness.

The relief requested should be denied.

Douglas, Judge

W.C. Davis, Judge, concurs in this opinion

APPENDIX B

Ex parte Reuben COLUNGA.

No. 60,698

Court of Criminal Appeals of Texas,
Panel No. 1.

October 10, 1979.

OPINION

This is a post-conviction habeas corpus proceeding under the provisions of Article 11.07, V.A.C.C.P.

The record reflects that petitioner was convicted of murder and his punishment was assessed at one hundred ninety-nine (199) years' imprisonment. On appeal the conviction was reversed because of insufficient evidence to corroborate the accomplice witness. On rehearing this court held that upon a finding on appeal that the evidence is insufficient to corroborate the testimony of an accomplice witness the proper disposition is to reverse and remand the cause for a new trial in light of the provisions of Article 44.25, V.A.C.C.P. See *Colunga v. State*, 481 S.W.2d 866 (Tex.Cr.App. 1972).

Petitioner was retried and convicted and again his punishment was assessed at one hundred ninety-nine (199) years' imprisonment. His conviction was affirmed on appeal. *Colunga v. State*, 527 S.W.2d 285 (Tex.Cr.App. 1975). His claim of double jeopardy was rejected.

Petitioner now urges that in light of the holdings in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), he is entitled to post-conviction habeas corpus relief. In *Burks* it was held that the double jeopardy provision of the Fifth

Amendment would prevent the retrial of an individual whose conviction had been reversed because of the insufficiency of the evidence to sustain the conviction. *Greene* makes clear that *Burks* was applicable to state criminal proceedings by virtue of the Fourteenth Amendment.

The trial court made findings of fact and conclusions of law which support appellant's contentions. The only question remaining is the retroactivity of the holdings in *Burks* and *Greene*. In *Minix v. State*, 579 S.W.2d 466 (Tex.Cr.App. 1979),[1] this court held that *Burks* and *Greene* are to be applied retroactively.[2] Petitioner is entitled to the relief he seeks. Petitioner is ordered released from confinement from the Texas Department of Corrections as a result of his conviction for murder.

It is so ordered.

ONION, Presiding Judge

---

[1]Cf. *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973).

[2]It is observed that in *Johnson v. State*, 571 S.W.2d 4 (Tex.Cr.App. 1978) (footnote # 2), Article 44.25, V.A.C.C.P., was held unconstitutional insofar as it was in conflict with *Burks* and *Greene*.